Dated: August 16, 2005

John E. Hoffman, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

In re:	:	
	:	Case No. 04-67961
WILLIAM T. ELKINS and	:	Chapter 13
LISA M. ELKINS,	:	Judge Hoffman
	:	
Debtors.	:	

OPINION AND ORDER SUSTAINING
OBJECTION OF VINTON COUNTY NATIONAL BANK
TO DEBTORS' CHAPTER 13 PLAN

The Vinton County National Bank ("Bank") objects to confirmation of the Chapter 13 plan of William T. Elkins and Lisa M. Elkins ("Debtors"), asserting that § 1325(a)(5) of the Bankruptcy Code does not permit the Debtors to bifurcate the Bank's secured claim by surrendering part of its collateral—a mobile home—while retaining the other portion—the lot on which the mobile home sits. The Court agrees with the Bank and accordingly denies confirmation of the plan.

I. Background

This matter is before the Court on the First Amended Chapter 13 Plan ("Plan") (Doc. 9) filed by the Debtors on December 13, 2004; the objection to confirmation of the Plan ("Objection") (Doc. 15) filed by the Bank on December 22, 2004; the response to the Objection ("Response) (Doc. 21) filed by the Debtors on February 14, 2005; and the stipulation between the Debtors and the Bank ("Stipulation") (Doc. 23) filed March 25, 2005.

The parties stipulate that the Bank has a valid and enforceable lien on a 1997 Skyline mobile home ("Mobile Home")[1] and a valid and enforceable mortgage on real property at 847 Pennington Road, Waverly, Ohio ("Property"). They also stipulate that as of the date of filing of the Debtors' petition, the Bank was owed $79,781.29 on a variable-rate, consumer promissory note secured by the Mobile Home and the mortgage on the Property. The Bank rejects the Plan. Stipulation ¶¶ 2, 3 and 4.

The Plan contains a "Special Provision" setting forth the proposed treatment of the Bank's claim. This Special Provision, which the Bank finds objectionable, reads as follows:

> 1997 Skyline Mobile Home to be surrendered to Vinton County National Bank, further said mobile home to be sold in a reasonable commercial manner with all proceeds from sale to be applied to mortgage balance, said creditor being entitled to file an unsecured deficiency claim, if any, for the unpaid balance of the mortgage loan after appropriate adjustment for value of the 5 acres of land located at 847 Pennington Road, Waverly, Ohio 45690 being paid through the debtor's chapter 13 plan in accordance with plan paragraphs 2(5)

[1]The Court notes that the copy of the title to the Mobile Home, attached as Exhibit C to the Stipulation, lists Ross County Banking Center rather than Vinton County National Bank as the lienholder. However, because the parties have stipulated that Vinton County National Bank is the lienholder, the Court will presume for purposes of this decision that Vinton County National Bank holds a valid lien on the Mobile Home.

> and 2(10), said Creditor to release its mortgage lien upon further court order or discharge, which ever occurs first.

Plan at ¶ 3. Thus, the Debtors propose to surrender the Mobile Home and allow the Bank to sell it in a commercially reasonable manner, applying the proceeds of the sale to the Bank's secured claim. After application of the proceeds, the Debtors propose that the balance of the Bank's secured claim will be allowed in the amount of $13,000, the value the Debtors place on the Property. The remaining debt owed to the Bank will be treated as a general unsecured claim, to be paid at five cents on the dollar, pursuant to paragraph 2(10) of the Plan. The Bank asserts that the Mobile Home and the Property have a combined value of $75,000, and has submitted an appraisal in support of its position. It argues that the Special Provision violates § 1325(a)(5) of the Bankruptcy Code[2] because the Bank has not accepted the Plan and the Plan does not either (1) call for the surrender of the collateral securing the claim to the Bank; or (2) provide that the Bank will retain its lien while the Debtors pay the Bank an amount equal to the present value of the allowed amount of its secured claim.

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[2]Section 1325(a)(5) of the Bankruptcy Code provides as follows:

> (a) Except as provided in subsection (b), the court shall confirm a plan if—
> . . . .
> (5) with respect to each allowed secured claim provided for by the plan—
> (A) the holder of such claim has accepted the plan;
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
> (C) the debtor surrenders the property securing such claim to such holder[.]

11 U.S.C. § 1325(a)(5) (West 2004).

II. Legal Argument

At issue is whether the alternatives for the treatment for secured claims provided in 11 U.S.C. § 1325(a)(5) are mutually exclusive. The Bank says yes; the Debtors disagree and believe that the Plan may provide for the partial surrender of the collateral securing the Bank's claim.

The Debtors offer three arguments in support of their position. First, they assert that the Bankruptcy Code must be interpreted to promote a debtor's fresh start, and to the extent any portion of the Code is ambiguous or unclear, it should be applied in a manner favorable to the debtor. Second, the Debtors argue that the Supreme Court's admonition to apply statutory directives in accordance with their plain meaning, coupled with the rule of construction set forth in 11 U.S.C. § 102(5)—"that 'or' is not exclusive,"—require the Court to conclude that use of the word "or" between sub-parts (B) and (C) of § 1325(a)(5) permits a debtor to choose some combination of the options for the treatment of a secured claim delineated in those subparts. Third, the Debtors urge the Court to adopt the reasoning of the court in *In re McCommons,* 288 B.R. 594 (Bankr. M.D. Ga. 2002), which held that the provisions of § 1325(a)(5) are not mutually exclusive and ruled that where multiple items of collateral secure a creditor's claim, a debtor may elect to surrender some items while retaining others.

The Bank, on the other hand, asserts that the holding in *Williams v. Tower Loan, Inc. (In re Williams),* 168 F.3d 845 (5th Cir. 1999) is controlling. In *Williams,* the Fifth Circuit concluded that Congress did not intend, by using the word "or" between sub-parts (B) and (C) of § 1325(a)(5), to create a hybrid alternative for the treatment of secured claims in Chapter 13 plans. The *Williams* court relied heavily on the following language from the Supreme Court's decision in *Associates Commercial Corp. v. Rash,* 520 U.S. 953 (1997):

> If a secured creditor does not accept a debtor's Chapter 13 plan, the debtor has two options for handling allowed secured claims: surrender the collateral to the creditor, see § 1325(a)(5)(C); or, under the cram down option, keep the collateral over the creditor's objection and provide the creditor, over the life of the plan with the equivalent present value of the collateral, see § 1325(a)(5)(B). The "disposition or use" of the collateral thus turns on the alternative the debtor chooses – in one case the collateral will be surrendered to the creditor, and in the other, the collateral will be retained and used by the debtor.

Id. at 962. The court found that "[t]his language strongly indicates that a debtor cannot combine subsections (B) and (C) to create a fourth option." *Williams*, 168 F.3d at 847.

The same rationale was relied upon by the bankruptcy court in *In re Covington*, 176 B.R. 152 (Bankr. E.D. Tenn. 1994). There, the debtor proposed a Chapter 13 plan calling for her surrender of a mobile home and retention of a stove and refrigerator installed in the mobile home. The appliances were included as part of the purchase price of the mobile home and were pledged to the lender along with the mobile home as collateral. The *Covington* court ruled that permitting the cram down of only a portion of a secured claim "would be tantamount to a finding that a creditor in a Chapter 13 case who has a single claim may, at the whim of the debtor, be compelled to bifurcate the secured portion of its claim into as many individual claims as it has items of property securing its claim. Clearly this interpretation would be inconsistent with §§ 506(a) and 1325(a)(5)." *Id.* at 155. Further, "the lack of flexibility within the cram down provisions of § 1325(a)(5)(B) makes it clear that the bifurcation of [the creditor's] claim is inappropriate." *Id.*

The court reached the same result in *In re Schwartz*, 1998 WL 37551 (Bankr. E.D. Pa. 1998). In *Schwartz*, the debtors attempted to bifurcate the secured claim of the IRS, surrendering real property and retaining personal property. The court reasoned that "[i]f the legislature had intended to provide debtors with the option of surrendering only part of the collateral securing a claim, it

could have included language within the subsection providing that alternative." *Id.* at *3. The court also found that "[a] secured claim is valued by all the collateral that supports it. Severing the claim into components defined by parts of the collateral package is contrary to the statutory language of § 1325(a)(5)." *Id.* at *4.

The decisions in *Williams, Covington* and *Schwartz* are well-reasoned and persuasive. The presumption in favor of a debtor's fresh start does not permit a court to rewrite § 1325(a)(5) to provide relief that is otherwise unavailable. The Court concludes—like the *Williams*, *Covington* and *Schwartz* courts—that § 1325(a)(5) sets forth mutually exclusive options for the treatment of secured claims, not alternatives that may be combined to form a composite remedy. As pointed out by the court in *Schwartz,* had Congress intended § 1325(a)(5) to permit partial surrender of collateral it could have done so by drafting part (C) to permit a debtor to surrender *all or part* of the property securing a claim. *Schwartz*, 1998 WL37551 at * 3. The statute, however, does not contain that language.

Accordingly, the Objection is **SUSTAINED** and confirmation of the Plan is **DENIED.** The Debtors shall have twenty (20) days from the date of the entry of this order within which to file and serve an amended plan. Failure to timely file a confirmable plan shall result in dismissal of this case. In the event an amended plan is timely filed, the Chapter 13 Trustee shall re-set this case on the next available confirmation docket.

IT IS SO ORDERED.

Copies to:

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